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In the Supreme Court of the United States

IDA McCLURG, PLAINTIFF IN ERROR,
vs.
WILLIAM A. PERRY, DEFENDANT IN ERROR.
No. 284.

OCTOBER TERM, 1902.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

SUPPLEMENTAL BRIEF

OF PLAINTIFF IN ERROR ON MOTION TO DISMISS AND ON THE MERITS OF THE CASE.

S. H. HARRIS,
For Plaintiff in Error.
J. J. DARLINGTON,
Of Counsel.

In the Supreme Court of the United States

IDA MCCLUNG, PLAINTIFF IN ERROR,
vs.
WILLIAM A. PENNY, DEFENDANT IN ERROR
} No. 384.

OCTOBER TERM, 1902.

Statement of Facts.

After brief in this case was forwarded to the clerk of the Court by the printer, it was discovered that the same did not comply with Rule 31, and with the opinion of this Court in Railroad Company *vs.* Jacobson, 179 U. S. 294, and for that reason counsel for plaintiff in error request that this brief be considered in lieu thereof.

On May 14, 1900, the defendant in error, William A. Penny, commenced an action in the Probate Court of Kay County, Oklahoma Territory, which was by him termed a "complaint in forcible entry and detainer," to recover of Ida McClung the possession of the southwest quarter of Section 30, Township 26 north, Range 1 east of the Indian Meridian, in said county and Territory. The plaintiff in

that action, defendant in error, alleged that he was the owner and entitled to the immediate possession of the premises. After several rulings and orders in the case, not material at this time, the plaintiff in error, Ida McClung, on the 26th day of May, 1900, filed her answer and plea of title in said cause, and asked that the case be certified to the District Court for trial of the issue of title between the parties. The answer, and exhibits thereto, present all the facts involved in the motion to dismiss the proceedings in error in this Court, as well as the consideration of the case upon the merits.

After a general denial of the allegations of the complaint, which included a denial of the plea of title in the plaintiff in that action, plaintiff in error, said Ida McClung, set out in her answer that title to the land before described was in dispute in the action, and that the Justice Court had no jurisdiction to try the same as a case of forcible entry and detainer.

Probably the essential facts set forth in the answer are that Ida McClung is the widow and heir-at-law of Charles R. McClung, who, being duly qualified under the laws of the United States to take, hold, and acquire title to land in the Cherokee Outlet under the Homestead laws, made the race from the outer boundary of said outlet to the land in question, and immediately settled upon the same, claiming it as a homestead, and remained upon the land under such claim, cultivating and improving the same, in full compliance with the Homestead laws of the United States, until his death on the 19th day of November, 1898, and that since his death Ida McClung, his widow, has continued to reside upon, cultivate and improve the land as a homestead, under her claim of ownership therein, by virtue of compliance with the laws of the United States, and has fully complied with all the provisions of the law in that respect. That the land department had erroneously awarded the land to Penny by reason of misunderstanding and misappli-

cation of the law with reference to the qualification of said Penny to hold and acquire title to land, by reason of the fact that Penny violated the Act of Congress and the proclamation of the President opening the lands in the Cherokee Outlet to settlement on September 16, 1893, and that the title to the land being involved, and being the only controversy between the parties, the Probate Court had no jurisdiction to try the cause, and that the same should be certified to the District Court, in order that the real matter in controversy could be determined.

Perry Birdsell was the first to file a homestead entry upon the land. His entry was contested by McClung, and afterwards by Penny, the defendant in error herein. On March 24, 1894, Birdsell's entry was cancelled by relinquishment, and Charles R. McClung made entry of the land. The contest proceeding was continued by Penny against the homestead entry of McClung, and was carried through all the various departments and proceedings of the land department of the United States, and finally resulted in the cancellation of McClung's homestead entry, and the allowance of homestead entry upon the land by Penny.

It appears from the answer and the findings of fact by the department set forth in the answer, that at the hour of opening the lands in the Cherokee Outlet to settlement at 12 o'clock, noon, September 16, 1893, William A. Penny was within the outer boundary of the country known as the Cherokee Outlet, in violation of the Act of Congress and the proclamation of the President, and was at that hour on or near the east bank of the Arkansas river, and near the western border of the Osage Indian reservation, in said outlet, and from that point entered upon the race for the land in question, and by reason of his closer proximity, and on account of his presence within the outer boundary of the country known as the Cherokee Outlet, reached the land in question in advance of McClung. The facts relied upon by McClung being established by the findings of the land de-

partment, the cause presents but a single question of law, if the action was one which, in its nature, would permit of a determination of the question of title.

The only controversy that has ever existed between the parties, or that exists in the present cause, outside of the technical questions, is as to which of the parties actually owns the land, or has the paramount interest or equity therein, under the laws of the United States. Counsel for defendant in error contend that it is not necessary to decide this question in order to determine who was entitled to the possession of the land, and claim that they avoid the necessity of meeting the controversy with reference to the title of the land, or the equities of the parties, by beginning the action before a Justice of the Peace, or Probate Judge exercising the same jurisdiction, and denominating it an action of forcible entry and detainer, at the same time virtually admitting that if the action had been commenced in the District Court the real controversy could have been determined in one action.

The motion to dismiss the proceedings in error presents the sole question involved in the case, as we understand the law, that is, where the plaintiff begins an action, denominating it an action of forcible entry and detainer, before a Justice of the Peace, or Probate Judge exercising the same jurisdiction, and the real matter in dispute between the parties is the ownership of land, does the limit of the jurisisdiction of the Court in which the action is commenced prevent an investigation as to all the rights of the parties, and exclude any controversy as to the ownership of the land in dispute? If the title to the land in question is not involved this Court would have no jurisdiction to determine the controversy, because we admit that the rents and profits of the land do not amount to five thousand dollars, as the case now stands. On the other hand, if the ownership of the land is the real matter in controversy it is admitted by the record that more than five thousand dollars is involved in the suit.

We contend that this is the only question in the case, because the Supreme Court of Oklahoma holds that the title is not involved in the action, and cannot be involved, and that, therefore, they are not called upon to pass upon the actual rights of the parties, while if the title is involved, the Court would necessarily be compelled to investigate all the rights of the parties in the matter in dispute.

Stating the rule in different language, we would say that plaintiff in error contends that the nature of the controversy between the parties determines the Court and the nature and scope of the proceedings, while the defendant in error contends that the selection of the Court and the denomination of the proceedings by the plaintiff in the action determines the nature and scope of the investigation.

Brief and Argument on Motion to Dismiss.

It is not necessary that this Court should be of the opinion from the record presented that the title claimed by the plaintiff in error is, or was, paramount to the title claimed by the defendant in error, but we think it is only necessary that the Court should look far enough into the facts to see that the real matter to be adjudicated is the question of title, and this Court cannot properly determine how that question should be adjudicated until the controversy is before the Court from a Court having jurisdiction to determine that matter, and permit of its being properly brought to this Court for review.

Malloy *vs.* Malloy, 40 N. W., 285.

The motion to dismiss is based upon the decisions of the Supreme Court of the Territory of Oklahoma, and principally upon the case of McDonald *vs.* Stiles, 7 Okla., 327. If these decisions had not recently been departed from by the Supreme Court of Oklahoma Territory, our conclusion as to the extent of the inquiry into the controversy over the title

would be sustained even by the decisions of the Territorial Court. But this conclusion is contrary to the doctrine of the Territorial Court more recently announced, and which we will later refer to, and if this recent construction and decision of the laws of the Territory is to be followed, then the question of title is before this Court for investigation and determination, even in the present form of action.

The decisions of the Supreme Court of the Territory complained of herein, make no reference to the statutes of the Territory, and do not pretend to be any construction of any local statute, but we will set forth the statutes which we believe to be applicable.

Section 9 of the Organic Act of the Territory of Oklahoma, provides that:

> "Justices of the Peace, who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute."

Section 4005 of the statutes of Oklahoma of 1893 is as follows:

> "Any Justice, within his proper county, shall have power to inquire, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into the lands or tenements, unlawfully and by force hold the same; and if it be found, upon such inquiry, that an unlawful and forcible entry has been made, and that the same lands and tenements are held by force, or that the same, after a lawful entry, are held unlawfully, then said justice shall cause the party complaining to have restitution thereof."

And Section 4806:

"Proceedings under this article may be had in all cases against tenants holding over their terms; in sales of real estate on executions, orders, or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree, by virtue of which such sale was made; in sales by executors, administrators, guardians, and on partition; where any of the parties to the partition were in possession at the commencement of the suit, after such sales, so made, on execution or otherwise, shall have been examined by the proper Court, and the same, by said Court, adjudged legal; and in cases where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession. This section is not to be construed as limiting the provisions of the first preceding section."

And Section 4645:

"If in any action commenced before a Justice it appears to the satisfaction of the Justice that the title or boundaries of land is in dispute in such action, said action shall be stayed before said Justice, and said Justice shall, within ten days thereafter, certify said case, and transmit all papers and process therein to the clerk of the District Court of his county, and said case shall be docketed and thereafter proceeded with in the District Court as if originally commenced therein; the Justice before whom said action is commenced shall require of the defendant setting up said title or boundary, to set forth in his answer or bill of particulars a full and specific statement of the facts constituting his defense of said title or boundary brought in question; and the defendant shall be required to make affidavit of the truthfulness of the statements in his said answer or bill of particulars contained, and that said defense is *bona fide* and not made for

vexation or delay, but for the promotion of justice."

And Section 4646:

"Justices shall not have cognizance of any action * * * in which the title to real estate is sought to be recovered, or may be drawn in question."

Section 4492:

"In any action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition, that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and twenty-seven, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived."

Section 4493:

"It shall be sufficient, in such action, if the defendant in his answer, deny, generally, the title alleged in the petition, or that he withholds the possession, as the case may be, but if he deny the title of the plaintiff, possession, by the defendant, shall be taken as admitted. Where he does not defend for the whole premises, the answer shall describe the particular part for which defense is made."

Section 4005 (section 127 above referred to):

"In any action for the recovery of real property, it shall be described with such convenient certainty as will enable an officer holding an execution to identify it."

Section 3882:

"The distinction between actions at law and suits in equity, and the forms of all such actions

and suits, heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action."

Section 3961:

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of either one of the following classes: * * * Sixth. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same."

Section 3972:

"The answer shall contain: *First.* A general or specific denial of each material allegation of the petition controverted by the defendant. *Second.* A statement of any new matter constituting a defense, counter-claim, or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition. *Third.* When relief is sought, the nature of the relief to which the defendant supposes himself entitled. The defendant may set forth, in his answer, as many grounds of defense, counter-claim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both."

We contend that these provisions of the statute control, and compel compliance therewith, and that they cannot be evaded by the selection of the Court in which the action is commenced, or by the title applied to the pleading or process. If the defendant in error has a right to exclude us from the benefits and rights guaranteed by the sestatutes, merely by commencing his action before a Justice of the Peace and putting a name to it which is too small and re-

stricted to admit of an investigation of the real matter in controversy, it is unneccessary to make further investigation, because we admit that a Justice of the Peace has no jurisdiction to try title, either legal or equitable, in any form, or under any name. We contend that the scope of the investigation, and the name and style of the proceedings, are determined by the inherent nature of the controversy between the parties, and in actions of this kind that inherent nature could only appear from the answer of the defendant, and the facts, and that it was just such cases that section 4645 was intended to cover. In the Court below it was insisted that Probate Courts did not possess the extraordinary power of Justices of the Peace in forcible entry and detainer cases, but that contention is not relied upon here.

The decision complained of is in harmony with a part of the other decisions of the Territorial Court, but we do not think that it is sustained by any of the Territorial decisions cited by the learned judge who wrote the opinion, unless, perhaps, it be the case of McDonald *vs.* Stiles, 7 Okla. 327. See Steele *vs.* Noell, 69 Pac. 1077; Brown *vs.* Hartshorn, 69 Pac. 1049; McQuiston *vs.* Walton, 69 Pac. 1048.

We think that all these decisions ignore the law as laid down by this Court in the case of Black *vs.* Jackson, 177 U. S. 349. The Supreme Court of the Territory, under the mandatory injunction proceeding overthrown by the Black-Jackson case, uniformily held that a homestead entry conclusively gave to the holder thereof the right of possession of the entire tract of land embraced therein, and that in such an action the Court could not, and would not, inquire into the rights of the defendant at all. They have been consistent in following that part of the doctrine of the mandatory injunction cases, even in the face of the decision of this Court just referred to. We have admitted in all these cases that a homestead entry, prior to the issuance of patent by the government, gave the right to such possession and priv-

ileges upon the premises as would permit a compliance with the homestead laws of the United States, and that a homestead entry was available for no other purpose, unless it was a valid entry. The United States has not undertaken to guarantee to the holder of a homestead entry, which was allowed in violation of law, anything except the right to comply with the homestead laws, and receive a patent for the benefit of the real owner of the premises, and we deem it unnecessary to cite authorities, other than the case of Black *vs.* Jackson and the cases therein referred to and discussed.

The writer of the opinion complained of herein appears to think that we are asking the Court to cancel the homestead entry, or to investigate the validity therof, for the purpose for which it is held under the homestead laws, but we only question the validity of the entry when the holder thereof seeks to use it for an entirely different purpose, which is, in this case, the right to exclude the plaintiff in error from possession of the land long enough to transfer the same to an innocent purchaser and convert the proceeds to his own use. If the defendant in error has such rights, it should be by reason of compliance with the law, instead of a violation of the law.

We think that the statutes of the Territory are amply sufficient for our protection, if properly applied, and that the Supreme Court of the Territory has construed the statutes in many cases as we contend they should be construed, and the difficulty in this case is, we think, that the Court refused to consider the rights of the plaintiff in error at all. If the plaintiff in error has any rights or vested interests in the matter in dispute, as recognized in the case of Black *vs.* Jackson, he is asserting that right in the present case, and in the only manner in which it could possibly be asserted. Since patent has not issued to the defendant in error, plaintiff in error could not maintain an action to cancel the homestead entry and obtain any affirmative relief, either by

beginning a direct action therefor, or by setting up the same in a cross-petition.

The defendant in error, in his motion to dismiss, relies upon affidavits showing that subsequent to the trial of the present action the legal title has passed from the Government of the United States to the defendant in error. If such facts can be considered at all in this case, we believe them to be in favor of the plaintiff in error, rather than unfavorable, because under the statutes of the Territory and the uniform holding of the Courts under similar code provisions, the question of title could be considered, where the Court had full jurisdiction thereof, and where the nature of the controversy between the parties warranted that sort of investigation.

In the recent decision of the Supreme Court of the Territory in the case of Hackney *vs.* McKee (not yet published), being a case precisely like the one at bar, the Supreme Court have expressed amazement at the fact that any attorney should continue to insist that the title to real estate could be tried or set up as a defense in an action of forcible entry and detainer. Counsel's excuse for presisting in appealing cases like the present one appears in the application for the advancement of the case of Winebrenner *vs.* Forney, and need not be repeated here, even if pertinent to the matter under consideration.

In the Hackney-McKee case the Court cites as authority for the doctrine under consideration, Olds *vs.* Conger, 1 Okla., 232; Oklahoma City *vs.* Hill, 4 Okla., 521; Chisholm *vs.* Weise, 5 Okla., 217; McDonald *vs.* Stiles, 7 Okla., 327; Dysart *vs.* Enslow, 7 Okla., 386; Kirtley *vs.* Dykes, 10 Okla., 16, and two recent Kansas cases following McDonald *vs.* Stiles in their dictum, but in which the facts call for no such doctrine. We think a review of these cases, as well as other decisions of the Territorial Court, both prior and subsequent to some of those cited, would throw light upon the matter under consideration, as the Oklahoma decisions

are relied upon in the motion to dismiss.

The case of Kirtley *vs.* Dykes makes no reference to any question involved in this case.

The case of Olds *vs.* Conger turns on the question of landlord and tenant, and the admissibility of certain evidence, and the question of the right of the defendant to set up his title under the statute and have the case certified to a Court of competent jurisdiction was not involved or in any manner referred to. It is true that the Court lays down the principle of law:

> "In an action of forcible detainer the title to property is not, and cannot be, tried and determined. The right of possession is the only right involved."

This we admit to be a correct statement of the law, but earnestly contend that it applies only to that which is in law and fact an action of forcible detainer, and that if the plaintiff should be mistaken as to the nature of the action and call it an action of forcible entry and detainer, when, in fact, tested by the inherent nature of the controversy between the parties, it should be an action to quiet title, or to enforce a specific performance, or any other sort of action, the doctrine ceases to have application, and the Court did not in that case pretend to say that all cases or actions were forcible detainer where the plaintiff called it an action of forcible detainer.

In the case of Oklahoma City *vs.* Hill the Court followed the familiar doctrine that an unlawful and forcible entry would be corrected in an action of forcible entry and detainer, even though the defendant, at the time of making the unlawful and forcible entry upon the premises, was the owner and entitled to the immediate possession of the premises. Neither the title nor the right of possession constitutes a defense in such an action, and the Court properly disposed of the case upon the facts.

In Chisholm *vs.* Weise the Court followed the same doctrine, in the following language:

> "In an action of forcible entry and detainer, under the statutes of this Territory, it is not competent for the defendant to show, as a defense, that the defendant claimed title, or even owned the title to the premises, where it is shown that the plaintiff was in the peaceable and quiet possession of said premises and was by force, dispossessed thereof by the defendant. A party, out of possession, though he may be entitled to the possession, must resort to legal means to obtain possession."

The Court, in the late case of Hackney *vs.* McKee, also cited two cases from the 7th Oklahoma Report, and we present our suggestions on those two cases, together with the case of Smith *vs.* Kirchner, 7 Okla., 166. These three cases were decided on the same day, and no two of them are in harmony, and not one of the three appears to correctly state the law.

In Smith *vs.* Kirchner the syllabus is as follows:

> "A Justice of the Peace has no jurisdiction in an action of forcible entry and detainer, in which the vendor of real estate brings an action to recover the possession of premises against a purchaser to whom he has made a contract for the sale of the land, and whom he has put in possession thereof, and who has made default in the payment of the purchase price. The remedy is by an action in the District Court to rescind the contract, or to foreclose the equitable interest of the purchaser."

Smith and his wife had purchased a piece of real estate from Kirchner, and had paid $80 upon the purchase price, and agreed to make a further payment of $170 on or before May 9, 1897. The Smiths having failed to pay the last

mentioned sum, Kirchner tendered to them the $80 received, and demanded possession of the premises. Upon refusal of the Smiths to surrender possession, Kirchner commenced an action in forcible entry and detainer. The statutes of the Territory with reference to the nature of the controversies in which an action of forcible entry and detainer would lie are set forth in the opinion, but no reference is made to the statute providing for certifying cases to the District Court where the title to real estate appears to be in controversy, and the Court determined that the cause should be returned to the District Court with the command that the District Court direct the Justice of the Peace to sustain the motion of the defendants below to dismiss the case, and overlooked the fact that the statutes of Nebraska contain no provision like our section 4645. The Court cites a number of authorities under statutes like our own, and which appear to be peculiarly applicable to the case at bar. R. R. Co. *vs.* Scupa, 20 N. W., 393; Molloy *vs.* Molloy, 40 N. W., 285. The last case cited draws a distinction between the doctrine that title cannot be investigated in a forcible entry and detainer case, and the rights of a party claiming title, substantially as follows: "Where a party in possession of real estate (not having entered forcibly) claims an interest in the land itself which only a Court of common law jurisdiction can determine, an action of forcible entry and detainer will not lie against him."

The mistake made by the learned judge in the case of Smith *vs.* Kirchner was in following the Nebraska cases, even to the extent of directing a dismissal of the action, where the title of property appeared to be involved, and overlooked our section 4645. In Nebraska such cases had to be dismissed, because there was no provision for tranferring them to the proper Court.

The language of the Oklahoma Court in the case of Smith *vs.* Kirchner is peculiarly applicable to the case at bar. The Supreme Court has never overruled or questioned the doctrine

of Smith *vs.* Kirchner, except by rendering opinions which appear to be in conflict therewith, and if Smith *vs.* Kirchner correctly states the law, it is peculiarly applicable to the motion of defendant in error, and makes it necessary to dispose of the case in favor of the plaintiff in error. The case fully recognizes the right of the defendant to protect his property interest in the premises in dispute, and that where the title is the matter in controversy the Justice Court has no jurisdiction. The Court uses the following language in the opinion:

> "But the failure to make payment of the note when it was due did not convert the possession into an unlawful possession. The defendants had made a payment upon the land. They had an equity in it. That equity could not be determined under the forcible entry and detainer act. Neither was the Justice of the Peace clothed with equitable jurisdiction to determine the rights of the parties under the contract, and the plaintiff in the action of forcible entry and detainer had no right to disregard the equity in the property, belonging to the defendants, and to proceed by forcible entry and detainer."

In the case at bar the plaintiff in error claims an equity in the land, by virtue of compliance with the laws of the United States, and our contention appears to be fully recognized in the case of Black *vs.* Jackson above referred to, and by Cornelius *vs.* Kessel, 128 U. S. 456–461, and especially by the following language:

> "By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter

is presented so the judiciary can act upon it."

It is admitted by the record before this court that the plaintiff in error has done all things necessary to entitle her to a patent to the land in dispute, unless the defendant in error is entitled to have the legal title of the government conveyed to him. This, we think, constitutes an equity in the premises, and a right which the Court should respect.

In McDonald *vs.* Stiles, the patent to the land in dispute had been issued, and an action of forcible entry and detainer was commenced by the holder of the patent, Stiles. McDonald claimed that the patent had been issued contrary to law, and that the real matter in dispute was the title to the property, and that he was the owner thereof, by virtue of compliance with the laws of the United States. The cases of Oklahoma City *vs.* Hill and Chisholm *vs.* Weise are taken as authority for the doctrine announced by the Court that an equitable defense could not be set up in an action of forcible entry and detainer, and the Court accordingly held that McDonald's plea of title should be stricken out, and that the legal title of the plaintiff in the action could alone be considered, and that the same gave him the indisputable right of possession.

We think there is a broad distinction between the cases cited and the opinion of the Court. It is one thing to dispossess a person by force and violence and enter upon premises in the peaceable possession of another, even though he have title and the right of possession, and quite another to say that a man can be dispossessed of his own property, and that which he has peacefully possessed for years, by on claiming under a void deed, merely because the holder of the void deed saw fit to file his action before a Justice of the Peace, who was without jurisdiction to try the matter in controversy. It seems to us that it would be more just to compel the plaintiff to come into a Court that could determine the real merits of his claims, than to whittle down

or deny the defense and the rights of the defendant, in order to accomodate the case to the jurisdiction of the Court selected by the plaintiff.

The learned judge who wrote the opinion says that:

> "We are satisfied that it was never the intention of the legislature that any question other than that of the right of possession should be tried in this class of cases. It was the purpose to provide a speedy and inexpensive mode of restoring real estate to one rightfully entitled to the same."

Such is doubtless a correct interpretation of the intention of the legislature, but we fail to see why that intention should be construed into a declaration that it was the intention of the legislature by this form of action to enable a person to gain possession of real estate, even though he was not entitled to the possession, merely by commencing the action in the Justice Court, and calling it forcible entry and detainer.

We fail to see how McDonald *vs.* Stiles can be harmonized with Smith *vs.* Kirchner, and Dysart *vs.* Enslow presents some peculiar features not common to either of the others, and does not appear to be in harmony with the law as declared in the other two cases. In the latter case, the plaintiff claimed the right of possession by virtue of a deed which the defendants alleged to be fraudulent and void. The plea of the defendants was on the same theory as in the McDonald-Stiles case, viz: that the jurisdiction of the Court was not sufficient to permit of an investigation of the rights of the defendants. The discussion of the case seems to indicate that the deed really had no bearing upon the matter in dispute, and in this regard the opinion is so indefinite that we can make no application of it. The peculiar feature of the case is, that it denies that an equitable title can be considered at all in a forcible entry and detainer case, and the learned judge cites the Michigan cases, with reference to the

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nature of the title that will sustain an action in ejectment, but the judge goes on to declare that:

> "The principle enunciated in these cases has been asserted by this Court in the case of Olson *vs.* Thompson, 6 Okla., 576."

In order to show the application of the last mentioned case, we quote the syllabus in full:

> "*Replevin—Promissory Notes.* The maker of promissory notes is not the owner nor entitled to the immediate possession thereof unless the same have been paid or cancelled by a decree of Court, or for other reasons have become absolutely void and invalid as obligations in the hands of the payees or third parties; and until such payment or decree, or for other reasons, such notes have become absolutely void, and actions of replevin by the maker for the recovery of the possession thereof, will not lie."

The Michigan cases cited in Dysart *vs.* Enslow are based upon a decision of that Court in Harrett *vs.* Childs, 7 N. W. 63. This case is cited as authority for the Michigan cases above referred to, and the syllabus is as follows:

> "The common law rule, excluding all defences in ejectment not legal in their character, is still in force in the State of Michigan. To an action of ejectment brought by a guardian on behalf of certain wards claiming title by descent, the defendant interposed the defense that his grantor was in possession under a contract for the purchase of the land from a prior owner, when the ancestor of the wards surreptitiously obtained possession of such written contract, and afterwards procured the conveyance to be made to himself. Held, that as the defence was equitable in its nature it could not be properly interposed."

Several cases are cited in support of this doctrine, includ-

ing Foster *vs.* Mora, 98 U. S., 425. It seems evident that the Oklahoma Court overlooked the provisions of the statutes of the Territory with reference to the blending of legal and equitable defences, as well as the construction placed upon that statute by the Supreme Court of Kansas, prior to its adoption in this Territory. It appears to us that the three Oklahoma decisions last discussed, which were delivered and filed on the same day, are not only in conflict with each other, but that neither of them correctly states the law under consideration, and that all are based upon a misapprehension of the authorities cited therein.

We think that Smith *vs.* Kirchner more nearly states the law, and the authorities cited therein with approval are instructive upon the matter under consideration. See Nightingale *vs.* Barnes, 2 N. W., 767; Chicago, B. & Q. R. Co. *vs.* Scupa, 20 N. W., 393. In the last case the action was in forcible entry and detainer, and it appeared from the agreed statement of facts that the land was patented to the railroad company, and was by the railroad company sold or contracted to the defendant, and that the defendant went into possession. That the defendant defaulted in the payments upon his contract, and the contract was cancelled and declared forfeited by the land commissioner of the railroad company. Notice was served in the usual form, preparatory to beginning an action of forcible entry and detainer. Upon presentation of the facts, the Justice, on motion of the defendant, dismissed the cause for want of jurisdiction. The decision of the Justice was sustained by the District Court, and the case was taken to the Supreme Court. The statutory provisions are precisely like those of Oklahoma Territory. In discussing the matter in dispute in the case at bar, the Court there said:

> "It must be further observed, that while the plaintiff might, under the terms of this contract, cancel it and refuse to be further bound by it, in case of default, yet it could not

> do so to the extinguishment of any equities which might exist in favor of the defendant. It may be, and doubtless is, claimed that in this case he has none. This may be true; but if this action can be maintained in this case, it can in any case of the sale of real estate, and all equities in favor of the purchaser completely terminated and cancelled at the will of the vendor by the simple act of the selection of the Court in which he will prosecute his action; for it is well known that no defense of that kind can be made in proceedings under the sections above quoted. So long as the contract continues, so long has the purchaser an interest in the subject of the contract. So long as that interest or title exists, the Justice has no jurisdiction in the case. In an action in ejectment, or other proper proceedings in a Court of general jurisdiction, all equities and defenses can be fully adjudicated. In Justice's Court they cannot be, for the reason that no jurisdiction or authority to do so exists, and, therefore, in suits between vendor and vendee, growing out of the contract of sale, the District Court only has jurisdiction."

It will be noticed that the Nebraska Court also positively asserts the doctrine that title is not involved in a forcible entry and detainer action, but instead of dispensing with the defense in order to make the case fit the Court, they dispense with the Court of limited jurisdiction in order to make the Court fit the controversy between the parties. The only mistake made by the Oklahoma Court in citing and following the decision, is in assuming that Nebraska has a statutory provision like our section 4645, which provides that actions shall be certified to the District Court when title appears to be involved. By a compliance with this statutory provision, the case would be as effectually placed in the District Court for all purposes, as by a dismis-

sal of the proceedings in the Justice Court and beginning a new one in the District Court, as required under the Nebraska statute. The code of Oklahoma Territory, prior to its adoption from the State of Kansas, was construed to make provision for equitable titles, both in support of and in defense to actions of forcible entry and detainer and ejectment.

Alderman *vs.* Beacon, 25 Kan. 658;
Holenback *vs.* Ess, 31 Kan. 87;
Conway *vs.* Gore, 27 Kan. 122.

In the last case, Mr. Justice Brewer, speaking for the Court, says:

> "At that time all the rights and titles held to the premises were equitable, and if these equitable rights may not be shown, if the existence of the naked legal title in the plaintiff shuts out all question of the existence and extent of the defendant's equitable rights, then substantial justice may be sacrificed to mere form. But, as we have said, the law is not so. So far as evidence of title is competent and proof of title affects the action, this kind of evidence and proof of the equitable is as sufficient as of the legal title."

In Duffey *vs.* Rafferty, 15 Kan., 9, the syllabus is as follows:

> "In an action in the nature of an action in ejectment in Kansas the plaintiff may recover if he has any right to the property and if that right is paramount to any right to the same possessed by the defendant, although the legal title to the property may be outstanding in some third person, and although some third person may have a better right to the property than the plaintiff."

See Simpson *vs.* Boring, 16 Kan., 248;
Mooney *vs.* Oleson, 21 Kan., 697;
Gale *vs.* Eckart, et al., 65 N. W., 274.

As a futher evidence of the peculiar state of the law as set forth in the decisions of the Supreme Court of Oklahoma, we will refer to the case of Yingling *vs.* Redwine, 69 Pac., 810. We have already remarked that the doctrine declared in the decision herein complained of has been subsequently adhered to in the same Court in a number of cases involving the same matters of fact, a number of which later decisions have been rendered by Burford, C. J. The Yingling–Redwine case was an action of forcible entry and detainer. Yingling claimed to be the absolute owner of certain real estate, by virtue of a warranty deed from Redwine, and commenced his action of forcible entry and detainer to recover possession. The action was commenced in the Probate Court of Pawnee county, but the jurisdiction of the Probate Court in actions of this kind is conceded to be the same as that of a Justice of the Peace. Redwine claimed in his defense that the deed was given as security for money borrowed, and that the apparent legal title was no more than a mortgage upon the property. Yingling recovered judgment in the Probate Court on this plea of title, and Redwine appealed to the District Court. In the District Court a demurrer was interposed to the evidence of the plaintiff, which demurrer was sustained by the Court, and an appeal was taken to the Supreme Court on the judgment sustaining the demurrer to the evidence. The Supreme Court not only holds that the title of the defendant may be presented and considered in the action, but adjudges the deed to be an equitable mortgage, and fixes the rights of Redwine, the defendant, as owner of the property, subject to a lien of seven hundred dollars secured by the deed.

By a comparison of the Oklahoma decisions it would appear that the Court has confounded the common law definition of forcible entry and detainer with the statutory proceeding, and that they have wholly failed to consider the provisions of the statute with reference to the claim of title or color of title, and this error seems to be indicated

by the opinion in the case of Frantz *vs.* Saylor, decided October 4, 1902 (not yet published), wherein they declare that "a forcible entry is a violent taking by one of lands and tenements occupied by and in the possession of another, by means of threats and force, and without authority of law." The facts in the case were that Frantz commenced an action for a "mandatory injunction," under the proceedings recognized in the Territory prior to the decision in the Black-Jackson case, and obtained a temporary order restraining Saylor from remaining in possession of a portion of the tract of land which both the parties were claiming to be the owner of. Frantz went into possession of this land and remained in possession until the dismissal of the suit and the dissolution of the temporary order of injunction. After the injunction was dissolved and that action abandoned, Saylor demanded possession of the premises which had been so invaded, possession being refused and forcibly withheld, commenced an action of forcible entry and detainer. The Supreme Court held that inasmuch as Frantz had gone into possession without threats, force or violence, though Saylor was prevented from interfering by order of the Court, he could not be dispossessed through an action of forcible entry and detainer.

By reference to page 101 of the American and English Encyclopædia of Law, first edition, it will be observed that the definition of forcible entry declared in the Frantz-Saylor case is the one there set forth, which appears to be the common law definition of forcible entry and detainer, and which has been entirely superceded by modern statutes on the subject. In many States the action is limited to the recovery of the possession which has been forcibly and violently invaded, without regard to the title of the parties or the right of possession, and the Supreme Court has followed the text of the encyclopædia, without regard to the nature of the statute upon which it is based.

The foregoing discussion of the decisions of the Supreme

Court of Oklahoma Territory may appear to this Court unnecessary in view of the law upon the subject declared by this Court in the case of Black *vs.* Jackson, supra, and in the case of Langford *vs.* Monteith, 102 U. S., 145. The last case cited has been universally cited and quoted from in the briefs of counsel for plaintiff in error in the present case, and in other similar cases in the Supreme Court of Oklahoma, but it has not yet been referred to in any of the decisions of the Court, or in any manner discussed, so far as their recorded judgments indicate. Nevertheless we think the case is in point. The case is on error to the Supreme Court of the Territory of Idaho, and the statute involved is almost identical with the statute of Oklahoma upon the subject of transferring causes from the Justice to the District Court. The Idaho statute, section 347, provided that:

> "On trial before a Justice of the Peace if it appear from the plaintiff's own showing or from the answer of the defendant verified by his oath that a determination of the action will necessarily involve the decision of the question of title to real property, the Justice of the Peace shall suspend all further proceedings and certify the case to the District Court of the county, which shall thereafter have jurisdiction over the case as if originally brought in that Court."

If there is any difference between this statute and the statute of Oklahoma on the subject, the difference is in favor of the contention of plaintiff in error in this case. The action was commenced before a Justice of the Peace as an action of forcible entry and detainer, to recover the possion of buildings and grounds, and the complaint charged that the defendant held the property under lease, and that the defendant had entered into possession under an agreement to deliver the possession upon ten days' notice, which notice had been given. The defendant set forth in his

answer that at the time of making the lease to the premises, he was in possession under John B. Monteith, Indian agent, and that he was induced to take the lease by the false representations of the plaintiff that he was the owner of the property, and that the buildings and grounds were, in fact, the property of the United States, and that orders had been issued by the government to defend its possession against the plaintiff The question of title was presented as between the plaintiff in the action, Langford, and the United States, and here again we think the case is far stronger than is really required to sustain the contention of the plaintiff in error in the case at bar, as the defendant in the case at bar, in the lower Court, sets forth equities and title in himself, and not in a third person. But the precise legal question upon the statutes referred to is disposed of by this Court in the language of Mr. Justice Miller, as follows:

> "The record of the case is imperfect, but it appears that the case was an appeal in the District Court from the judgment of the Justice of the Peace, and that the District Court overruled the motion of the defendant to dismiss the case because the Justice of the Peace was without jurisdiction to try it. The same matter was urged in the Supreme Court on appeal from the judgment of the District Court.
>
> We are of the opinion that the Justice of the Peace had no jurisdiction to try the case after the sworn answer of the defendant was filed, and that it was his duty to have certified it for primary trial to the District Court. When it came there on appeal, it should have been dismissed, because there could have been no lawful trial before the Justice."

See Murry *vs.* Burris, 42 N. W., 25.

As we understand the decision of this Court in Black *vs.* Jackson, it sustains the following proposition: First, that the title of the land for possession of which the action was

brought, was in dispute, and that the value of the land fixed the jurisdiction of this Court. Second, that the demurrer to the answer was improperly sustained, and that the answer stated a defense. Third, that it could not be presumed that the plaintiff, who had only a homestead entry, would comply with all the provisions of the law and finally acquire the legal title to the land, so that the rights of the defendant might be fully protected. Fourth, that the defendant had color of title in equity, and a vested interest in the property, including the right of possession of a portion thereof, by virtue of his compliance with the laws of the United States, and that such facts might be made to appear in his behalf upon the trial of the case. Fifth, that the action was triable in the District Court, upon the issues as framed. Sixth, that the plaintiff might bring his action in forcible entry and detainer and recover possession of that portion held by the defendant, unless it appeared that the officers of the land department erred, as a matter of law, in deciding the contest in his favor.

Of course this Court could not presume that the defendant in that case could prove the facts set forth in his answer, but unless the facts as admitted by the demurrer constituted a defense to the plaintiff's cause of action, if established by the evidence upon the trial, there was nothing to try either by the Court or jury, and the ruling of the lower Court sustaining the demurrer would, necessarily, have been sustained. The difference between that case and the one at bar is that Jackson, the plaintiff, made the race from the Chilocco School reservation, while the defendant in error started from a different reservation, within the same prohibited territory. If the question of the validity of the entry from an Indian reservation is a matter that must necessarily be adjudicated in the case at bar, then we repeat that the title to the property is involved in the controversy regardless of how this Court might determine that controversy if properly before it.

We do not apprehend that this Court will determine the qualifications of the defendant in error, or the effect that his entry upon the land from an Indian reservation would have upon the homestead entry in this cause, but, as the case is submitted along with the case of Winebrenner *vs.* Forney, in which the precise question was determined by the Supreme Court of Oklahoma Territory, all the matters in dispute between the parties will necessarily receive consideration, and if this Court should adopt the doctrine laid down in the case of Yingling *vs.* Redwine, then the question of the validity of an entry from an Indian reservation would necessarily be determined in this action, as well as that of Winebrenner *vs.* Forney. Otherwise, we think that this case would have to be reversed and remanded, regardless of the decision of the Court upon the merits of the controversy presented by the record in Winebrenner *vs.* Forney. In any event it might be necessary, in order to protect the rights of the plaintiff in error, to offer some suggestions upon the merits of the real controversy between the parties.

Defendant in error asserts in his motion to dismiss that final proof has been made upon the land in question, and that title thereto is now within the jurisdiction of the Courts of Oklahoma Territory, and that an action of ejectment is now pending, in which all the matters in controversy herein can be determined. In this they are partially mistaken. Jurisdiction over the land remains in the Secretary of the Interior until the legal title, that is, patent from the United States, has actually issued. It is true that for some purpose the land is dealt with after final receipt as though the legal title was in the prospective grantee by patent, but the Secretary retains jurisdiction over the title to the land as long as the naked legal title remains in the Government. This principle has been too long recognized to require the citation of authorities. If the defendant in error should succeed in ousting the plaintiff in error from the possession of the land before the patent actually issues, and an action is

commenced to have the same declared a title in trust for the benefit of the plaintiff in error, the land could, and certainly would, be transferred, and all the rights of the plaintiff in error thereby extinguished. Such has been the history of all these cases, and the anxiety and ingenuity expended upon the various proceedings to get possession without meeting the real matter in dispute is sufficient evidence that there is a controlling interest and purpose back of these proceedings.

The errors assigned in the writ of error in this case which we think directly present the matters discussed, are:

Second, The said Supreme Court of the Territory of Oklahoma erred in holding and deciding that the title and ownership of the land was not involved or drawn in question in said cause by the pleadings and evidence therein.

Third, That said Supreme Court of the Territory of Oklahoma erred in holding and deciding that the allegations of title in the bill of particulars of the plaintiff in said forcible entry and detainer action were but an incident to the right of possession when such allegations were denied and put in issue by the answer of the defendant.

Fourth, That said Supreme Court erred in rendering judgment for defendant in error and affirming the judgment of the trial Court, instead of rendering judgment for the plaintiff in error and reversing the judgment of said trial Court.

Fifth, That said Supreme Court erred in ignoring and refusing and neglecting to pass upon and determine the question as to the validity, as well as the force and effect of the homestead entry, relied upon by the defendant in error in the trial of said cause.

Sixth, The said Supreme Court of the Territory of Oklahoma erred in not holding and deciding that the defendant in error was disqualified to enter and acquire title to the land in question by reason of the fact that he had entered upon the lands embraced within the Cherokee Outlet in vio-

lation of the Act of Congress and the proclamation of the President opening the same to settlement.

Seventh, That said Supreme Court erred in not holding and deciding that said homestead entry could be considered valid and of any force and effect for the purpose only of complying with the laws of the United States and acquiring title to said land, and that when said entry was relied upon as a basis of the right to oust the plaintiff in error from the possession which she had acquired pursuant to the laws of the United States, and by reason of compliance therewith that the Court was then required to investigate and inquire into the validity, as well as the force and effect of said homestead entry for the purpose for which it was sought to be used in said cause.

Eighth, That said Supreme Court erred in not holding and deciding that plaintiff in error had a right, by reason of her compliance with the laws of the United States, to remain in possession of said land for the purpose of protecting her rights until patent had issued and an action could be commenced for the purpose of acquiring the legal title to said land.

These questions were presented in the trial Court (1) by the verified answer and motion to certify the case to the District Court; and (2) by the motion of plaintiff in error, defendant below, addressed to the District Court of Kay County, asking the dismissal of the action on the ground that the title to the premises in question was involved in the action, and that neither the District or Probate Court had jurisdiction to try the same as an action of forcible entry and detainer. (3) By the motion for a new trial.

Suggestions on the Merits.

The case of Winebrenner *vs.* Forney, No. 409, an action to cancel patent, and involving substantially the same facts as the present case, being set for hearing in connection with

this case and presenting only the question of the qualification of a person entering from an Indian reservation to acquire lands in the Cherokee Outlet, we deem it unnecessary to fully discuss that question in this brief, but will make a few suggestions for the purpose of showing that there is an important and substantial question in dispute between the parties, as to who actually has the better title or greater interest in the land in dispute.

Certain lands in the Cherokee Outlet were opened to settlement on September 16, 1893, by virtue of proceedings had pursuant to Section 14 of the Act of March 2, 1899, which section is as follows:

> "Section 14. The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim or interest of every kind or character in and to said lands. Any and all agreements resulting from such negotiations shall be reported to the President and by him to Congress at its next session, and to the council or councils of the nation or nations, tribe or tribes, agreeing to the same, for ratification, and for this purpose the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be immediately available: Provided, that said commission is further authorized to submit to the Cherokee Indians the proposition that said Nation shall cede to the United States, in the manner and with the effect aforesaid, all the rights of said Nation in said lands, and upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January 19, 1889, ratified by the present Congress, and if the said Cherokee Nation shall

> accept and by act of its legislative authority duly passed, ratify the same, the said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the President is authorized, as soon thereafter as he may deem advisable, by proclamation to open said lands to settlement, in the same manner and to the same effect as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon or occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto."

Much information with reference to the subject under consideration is contained in the pamphlet entitled; "Executive Document No. 78, 51st Congress, 1st Session. Letter from the Secretary of the Interior transmitted in response to Senate resolution of March 10, 1890; A compilation concerning the legal status of Indians in the Indian Territory."

It will be noticed that neither the subsequent act or the proclamation of the President opening the lands within said described tract ever gave permission to anyone to enter upon any portion of said lands lying west of the 96th degree of west longitude as aforesaid, except a certain residue thereof after exceptions were enumerated in the proclamation of the President, and the qualification of settlers with reference to the point of starting on the race for lands in any portion of said outlet was fixed by this section and the subsequent act of March 3, 1893. Congress had the power to fix the point of starting as an additional qualification of intending settlers.

Smith *vs.* Townsend, 148 U. S., 490.

The Act of 1893, among other things, provided:

"The President of the United States is

> hereby authorized at any time within six months after the approval of this act and the acceptance of the same by the Cherokee Nation as herein provided, by proclamation to open to settlement any or all lands not allotted or reserved, in the manner provided in section thirteen in the act of Congress approved March 2, 1889, entitled, 'An Act making appropriapriations for the current contingent expenses of the Indian Department,' etc. * * * No person shall be permitted to occupy or enter upon any of the lands herein referred to except in the manner prescribed by the proclamation of the President opening the same to settlement, and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

The proclamation then proceeds to describe and define the portions of the land embraced within said district from which persons were excluded, and upon which entry or settlement was prohibited, and to set forth what shall be opened to settlement, and we wish here to call attention to the fact that a portion of the lands actually opened to settlement and occupancy consisted of the Pawnee Indian reservation and the Tonkawa Indian reservation, except certain allotments to members of such tribes.

Treaty was completed with the Cherokee Nation of Indians for all lands west of the 96th degree of west longitude to the extent of whatever title or claim they might have therein, and also with the two tribes just mentioned, which had been settled upon said Cherokee Outlet, and their lands

purchased from the Cherokee Nation of Indians. All statutes and public papers with reference to the opening of the lands in the Cherokee Outlet, dealt with the country known as the Cherokee Outlet, and referred to the same as the entire tract of country considered or opened, and while certain designated portions of the outlet including land formerly the property of the Pawnee and Tonkawa Indians was declared opened to homestead settlement and occupancy, all lands including the Indian reservations not actually subject to homestead entry were included in the exceptions enumerated by the President in the proclamation.

The defendant in error contends that the tract of country referred to in the proclamation upon which parties were forbidden to enter, includes only such portions of the Cherokee Outlet as was actually opened and made subject to homestead entry and settlement. The plaintiff in error contends that all the country embraced within what is known as the Cherokee Outlet, being that tract of country lying west of the 96th degree of west longitude, etc., constituted the prohibited district, and that the qualification of settlers and the actual tracts of land to he occupied, in so far as the same relates to the prohibition contained in the act and proclamation, are separate and entirely different matters. We think it was the intention of Congress and the President to forbid persons to enter upon any territory which was actually described in the act and proclamation, and which the plain and unmistakable language of the acts and proclamation say that persons should not enter upon. We think the entire tract of country was dealt with, and that the line of prohibition extended around its outer boundary, regardless of what parcels or tracts of land within the main tract were actually subject to occupancy. If such was not the case we see no reason why these Indian reservations should have been excepted along with School reservations, the Chilocco Indian reservation, Saline reservation, etc. In other words, if these reservations were not included in the

tract of country being dealt with, why were they withheld from it by the proclamation? We think the contention of defendant in error here presents precisely the same question that was presented in Smith *vs.* Townsend, supra.

If that portion of the Cherokee Outlet after deducting all reservations from occupancy and homestead entry is to be considered the "entire tract of country" referred to in the acts and the proclamation, then defendant in error is correct in his contention. But such conclusion would include the privilege on the part of all intending settlers to go upon all reservations within the Cherokee Outlet, or the large number of School reservations adjoining the border, or even to follow the reservations for public roads throughout every portion of the entire tract of country, and there would remain nothing that could be called an entire tract of country except a quarter section or other legal subdivision under the United States survey.

It appears to us that Congress and the President intended to avoid the controversy which arose in Smith *vs.* Townsend, and to so definitely describe the entire tract of country opened to settlement, and to so specifically and certainly enumerate all portions thereof which could not be occupied, and so unmistakably fix the outer boundary and define what was called the "entire tract of country," that no possible controversy could arise. That the President understood that entry was prohibited upon all the country known as the Cherokee Outlet is made plain by that portion of his proclamation dealing with the one hundred foot reserve upon which intending settlers were permitted to make entry for the purpose of starting in the race, which is as follows:

> "A strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation is hereby temporarily set apart for the following purposes and uses, viz: said strip of land,

> the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet shall be opened to occupancy in advance of the day and hour named for opening said country by persons expecting and intending to make settlement pursuant to this proclamation," etc.

Even if the land had not before been specifically described by metes and bounds, and the eastern boundary fixed at the 96° of west longitude, and the northern boundary at the State of Kansas, this designation of the country known as the Cherokee Outlet could leave no uncertainty as to the starting point for intending settlers. The name Cherokee Outlet was derived from the purpose for which the lands were granted to the Cherokee Indians, and whether it shall hereafter be used as homestead land, as at present, or for any other purpose, all persons at all familiar with the history of the country will forever know that the Cherokee Outlet means a strip of country extending from the western border of the Cherokee Nation as far west "as the sovereignty of the United States and their right of soil extends."

If our contention as to the description of the country which persons were forbidden to enter upon or occupy is correct, under the plain language, meaning and purpose of the Act of Congress and the proclamation of the President, we have nothing to do with the reasons for this portion of the qualification of settlers. It is enough that Congress has expressed its intention. But the defendant in error, and those claiming under the same facts, seeks to introduce confusion by speculating on what the President intended to say, and what Congress ought to have said, and the Supreme Court of the Territory, in the case of Winebrenner *vs.* Forney, we think have given but slight consideration to the actual language of the act and proclamation, and have dealt almost entirely with these speculations as to what might have been or should have been said by the President.

The learned judge who delivered the opinion of the Court in the case or Winebrenner *vs.* Forney marks out what he calls reservations, and then designates the residue as "land opened to settlement," ignoring the fact that almost one-fourth of the portion of the outlet which he has designated as land opened to settlement was also reserved for homestead settlement.

It was contended by the defendant in error in the lower Court that the Indian reservations within the Cherokee Outlet could not have been included in the general description of lands, entry upon which was prohibited, even though the actual exterior boundaries were properly described, for the reason that certain portions of the Cherokee Outlet had been sold to friendly Indians, and that Congress and the President could have been dealing only with the residue of the outlet. A single suggestion we think is sufficient to dispose of this contention, even though we go out of the language of the act and the proclamation, and enter the contest in the realm of speculation. The Pawnee Indian reservation and the Tonkawa Indian reservation consisted of lands purchased from the Cherokee Indians, under the treaty providing for the settlement of the friendly Indians upon the outlet. If they ceased to be a portion of the outlet by virtue of that settlement and occupancy, surely they could not again become a portion of the outlet by reason of their purchase by the United States for the purpose of adding the same to the public domain. And the contention of the defendant in error, when tested by this simple example, would necessarily exclude the Pawnee Indian reservation and the Tankawa Indian reservation from the "country known as the Cherokee Outlet."

The learned judge who delivered the opinion in the Winebrenner–Forney case based his judgment almost exclusively upon the fact that the failure to place the one hundred feet reservation immediately around the various tracts of land opened to occupancy would make much of the coun-

try opened to settlement inaccessible on account of the distance from the one hundred-foot reservation to the desired land, and then disposes of the whole matter by the presumption that the President did not do such a foolish and unnecessary thing.

The western boundary of the Osage Indian reservation is the center of the channel of the Arkansas river, the bed of which is about one mile in width, and at low water the stream is about five hundred to eight hundred yards wide, and from five to fifteen feet deep. If this was a contest between presumptions, we would insist that the President, did not intend to locate intending settlers in this center of this river until the hour for opening the land to settlement.

Again, the grazing lands in the western portion of the Cherokee Outlet are so nearly worthless that a very small portion thereof has ever been taken under the homestead laws, and practically none of the same was occupied, outside of a few watered tracts, that were valuable in connection with the grazing districts, until the last two or two years. This western portion was from one hundred and fifty to one hundred and ninety miles from the rich lands along the Arkansas river, and again we think the weight of presumption is on the side of the plaintiff in error. It is quite probable that the President did not expect people to enter upon the lands from the eastern boundary of the Cherokee Outlet, any more than he expected them to go the western boundary and run a distance the length of the Outlet to get to the rich lands along the rivers on the east. It was merely intended that the Outlet should be used where people desired to use it, and none were compelled to go to a remote distance from the land they desired.

Again, the Supreme Court of Oklahoma insist that the lands opened to occupany are all that is included within the prohibited district. We repeat that there is no authority for such an assumption, and it does violence to the plain and unmistakable language of the Act of Congress and the

proclamation of the President. It is immaterial weather one was insane enough to go to the eastern end of the outlet, or to the western end, or to stand in the middle of the Arkansas river until the hour of the opening.

What the President intended, and the meaning of the language of the Act of Congress and the proclamation of the President, is most clearly and positively set forth by what the President and Secretary actually did at the time of, and immediately following, the promulgation of the proclamation. All persons were excluded from the Indian reservations within the Cherokee Outlet. They were not only warned that they would lose their right to occupy any portion of the lands opened to settlement, but they were commanded by the soldiery of the United States under the direction of the secretary of War, who, we presume, was acting directly under the command of the President, to leave the reservations. Persons found trespassing upon these reservations within the Cherokee Outlet were arrested and placed in the guard house, and the command of the soldiers with reference to the time of entering upon the homestead lands was enforced in at least one instance by the shooting and killing of the intruder, all of which appears from the report of the Secretary of War with reference to the proceedings of his department with reference to the opening of lands within the Outlet.

A great many persons made inquiry of the Secretary with reference to their right to enter upon these reservations, and in every instance they were warned that no such right existed. These warnings were widely published, at least by the consent, if not the direct authority, of the President and Secretary, and all persons had full knowledge thereof. The Interior Department has taken judicial notice of the fact that more than one hundred thousand people collected upon the borders of this country, and out of that vast number the records of the department show that not more than fifteen or twenty persons ever entered from the Indian res-

ervations on the east and made claim to lands in the outlet

The law and the proclamation with reference to this opening was applied in contest proceedings in the department as it had been before construed until December, 1896, more than three years after the opening, and until after there had been a change in the office of Secretary of the Interior. We think the contemporaneous construction of the act, leaving out of consideration the equities of the parties, is of vast importance, and in case of doubt or uncertainty as to the meaning of the law and proclamation, should be given controling importance in this case.

United States *vs.* State Bank of North Carolina, 6 Peters, 29–40.
United States *vs.* Moore, 95 U. S., 760.
United States *vs.* Johnson, 124 U. S., 236.
Pennoyer *vs.* McConnaughey, 140 U. S., 1.
United States *vs.* Alabama, etc., Ry. Co., 142 U. S., 615.

In the last case the Court says:

> "It is a settled doctrine of this Court, in case of ambiguity, the judicial department that will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

In the case at bar plaintiff in error not only insists upon his lawful right to the land by virtue of his qualification to enter the same, and compliance with the laws of the United States in making that entry, but had expended more than three years labor of himself and family upon the land prior to the change in the construction of the law under which he entered. And, again, he was not only controlled by his

opinion of the law, and by what appeared to be its plain language, as well as the universal construction thereof by practically every lawyer in the country, as well as the President and Secretary and all the departments of the government, but he was compelled to yield to the judgment of the nation and its people by the guns of the soldiers.

In the case at bar it will be noticed from the decisions attached to the answer of the plaintiff in error, that these few people who defied the law and power of the United States and by stealth and cunning, gained entry into the outlet, not only secured an advantage over the vast multitude who, voluntarily or otherwise, yielded to the commands of the government and rendered obedience to its laws and the construction thereof by the various departments, but on page 46 of the Record it appears that the department did not even require the usual settlement, occupancy and cultivation by those so especially favored.

For the conflicting constructions of the law and the proclamation by the land department in the leading cases, see Cagle *vs.* Mendenhall, 20 L. D., 440; Brady *vs.* Williams, 23 L. D., 533; 25 L. D., 402.

As a more full discussion of the question with reference to the legality of the entry into the outlet, as well as maps and other documents and citations will be presented to the Court in the case of Winebrenner *vs.* Forney, No. 409, we will submit the matter with these brief suggestions.

Respectfully submitted,

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